A 404(b) Compendium

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W.Va.R.Evid. 404(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice Required.* This evidence may be admissible for another purpose, such as proving **motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident**. Any party seeking the admission of evidence pursuant to this subsection must:

(A) provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

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Rule 404(b) "is an 'inclusive rule' in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to show criminal disposition." *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 761, 601 S.E.2d 75, 81 (2004); *quoting State v. Edward Charles L.,* 183 W.Va. 641, 647, 398 S.E.2d 123, 129 (1990).

- 404(b) evidence is not admissible merely to prove that the defendant has a propensity for criminal behavior.

"In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried." Syllabus Point 2, *State v. McDaniel*, 211 W. Va. 9, 560 S.E.2d 484 (2001); Syllabus Point 16, *State v. Thomas,* 157 W.Va. 640, 203 S.E.2d 445 (1974).

"The purpose of the rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes previously, he was more liable to commit the crime for which he is presently being indicted and tried." *State v. Finley*, 177 W. Va. 554, 556, 355 S.E.2d 47, 49 (1987), *citing State v. Harris*, 166 W.Va. 72, 75-76, 272 S.E.2d 471, 474 (1980).

- 404(b) evidence has a high potential for prejudice, and you should always litigate its admissibility.

"We cannot escape the fact that Rule 404(b) determinations are among the most frequently appealed of all evidentiary rulings, and the erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions. It is equally inescapable that where a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result." *State v. McGinnis*, 193 W. Va. 147, 153, 455 S.E.2d 516, 522 (1994) (internal citations omitted).

"A prudent prosecutor limits himself to what is needed to prove the charge in the indictment. In the process of proving the charge, other offenses may sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of 'background' material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction." *State v. Thomas*, 157 W. Va. 640, 656, 203 S.E.2d 445, 456 (1974) (internal citation omitted).

- Our court frowns upon excessive use of collateral act evidence, a.k.a. "shotgunning."

"As this Court has observed allowing the prosecution to admit an unnecessary quantity of extrinsic bad acts evidence is a practice sometimes referred to as 'shotgunning.' This Court has expressed its disapproval of this practice. A prudent prosecutor limits himself to what is needed to prove the charge in the indictment. In the process of proving the charge, other offenses may

sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of 'background' material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction." *State v. Parsons*, 214 W. Va. 342, 351, 589 S.E.2d 226, 235 (2003), *citing State v. Thomas*, 157 W.Va. 640, 656, 203 S.E.2d 445, 456 (1974).

- Defense counsel must request notice of the State's intent to present 404(b) evidence.

The notice provision of Rule 404(b) "is intended to reduce surprise and promote early resolution on the issue of admissibility." *State v. Zacks*, 204 W. Va. 504, 509, 513 S.E.2d 911, 916 (1998). However, defense counsel must always remember to request notice of the State's intent to introduce 404(b) evidence. Although the text of Rule 404(b) does not include this requirement, our common law does. Syllabus Point 3, *State v. Mongold*, 220 W. Va. 259, 262, 647 S.E.2d 539, 542 (2007); *see State v. Wileman*, No. 14-0264, 2014 WL 6607732, at *3 n.12 (W.Va. Nov. 21, 2014).

- The *McGinnis* admissibility hearing is intended to eliminate abusive and illegitimate uses of collateral act evidence.

***McGinnis* requires a three part test plus two limiting instructions: 1) Did the act occur and did the defendant commit the act (preponderance of evidence standard); 2) Is the evidence relevant to a limited purpose under 404(b); 3) 403 balancing test (cannot be substantially more prejudicial than probative); 4) Rule 105 limiting instructions should be given twice.**

"Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing

the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct were committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syllabus Point 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

"The linchpin for determining admissibility of prior act evidence is one of logical relevancy." *McGinnis*, 193 W.Va. 146, 156, 455 S.E.2d 516, 525 (1994). However, "[u]nder Rule 403, evidence of prior acts to prove the charged conduct may not be admitted simply because the extraneous conduct is relevant or because it falls within one or more of the traditional exceptions to the general exclusionary rule; to be admissible, the probative value of such evidence must outweigh risks that its admission will create substantial danger of unfair prejudice. The balancing necessary under Rule 403 must affirmatively appear on the record." *Id.*

"[W]hen admitting evidence under Rule 404(b), **the record must clearly reveal the analysis the trial court used to comply with the mandates of Rule 403**." *McGinnis* at 532, 163.

Failure to perform a *McGinnis* balancing test prior to admission of 404(b) evidence will result in a reversal. *Stafford v. Rocky Hollow Coal Co.*, 198 W.Va. 593, 482 S.E.2d 210 (1996).

- To proffer or not to proffer. Choose the latter.

At a *McGinnis hearing,* the trial court has discretion to accept a proffer of 404(b) evidence from the prosecutor rather than actually taking evidence from witnesses. *State v. McGinnis*, 193 W.Va. 147, 158, 455 S.E.2d 516, 527 (1994). However, this does not mean that defense attorneys should accept this scenario. The best practice is for a defense attorney to subpoena the State's 404(b) witnesses to the *McGinnis* hearing so that they may be subjected to cross-examination. You should never miss the chance to require a 404(b) witness get on the stand before trial. This will 1) make it possible to attack the credibility of 404(b) witnesses at trial in the event of inconsistent pretrial testimony; 2) give your client a chance to hear the 404(b) evidence against him; 3) eliminate the chance that during a proffer, the prosecutor may overstate the relevance of the alleged 404(b) evidence; and 4) create a record for the appellate court in the event that the trial court's factual findings are clearly erroneous.

Justice Ketchum has stated that it is reversible error for a trial judge to make 404(b) factual findings based upon the proffer of a prosecutor, because the judge has failed in his duty to take evidence at a *McGinnis* hearing. *State v. Bruffey*, 231 W.Va. 502, 517-18, 745 S.E.2d 540, 555-56 (2013) (Ketchum, J., dissenting). Justice Ketchum stated: "[t]he problem in the present case is that the judge heard no evidence upon which to base his detailed findings of fact. The judge based his findings only on the **assertions** of the prosecutor at the pre-trial hearing. No evidence was presented. Our law requires that the judge take evidence and find, by a preponderance of the evidence, that the elements of 404(b) are satisfied." *Id.* at 517, 555, *citing State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484 (2001).

- 404(b) evidence must be offered for a relevant, specific purpose.

"Where evidence is offered under Rule 404(b), the proponent bears the burden of showing how the proffered evidence is relevant to one or more issues in the case. The standard is clear. The proponent must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts. In addition, the trial court must specifically identify the purpose for which such evidence is offered and a broad statement merely invoking or restating Rule 404(b) will not suffice." *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 761, 601 S.E.2d 75, 81 (2004).

"[W]e hold that to satisfy the requirement to clearly show the specific and precise purpose for which evidence is offered under West Virginia Rule of Evidence 404(b) … the proponent of the 404(b) evidence must not only identify the fact or issue to which the evidence is relevant, **but must also plainly articulate how the 404(b) evidence is probative of that fact or issue.** *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 762, 601 S.E.2d 75, 82 (2004).

- The relevance of temporally remote 404(b) evidence is usually a jury issue. In other words, remoteness goes to weight, rather than admissibility.

"[T]his Court has recognized that the probative value of other bad act evidence is not completely nullified by the fact that various sexual assaults occurred remote in time from one another. In *State v. McIntosh*, 207 W.Va. 561, 534 S.E.2d 757 (2000), this Court held that evidence of prior sexual incidents involving a defendant teacher and his female students was admissible, although the sexual assaults occurred within four, seven and thirteen years of each other. In coming to this conclusion in *McIntosh*, we recognized that 'the decision on remoteness as precluding the admissibility of evidence is generally for the trial court to determine in the exercise of its sound discretion.' *Id., quoting State v.*

Gwinn, 169 W.Va. 456, 472, 288 S.E.2d 533, 542 (1982). We also relied upon our prior holding in *Yuncke v. Welker,* 128 W.Va. 299, 36 S.E.2d 410 (1945), wherein we stated:

> An abuse of discretion is more likely to result from excluding, rather than admitting, evidence that is relevant but which is remote in point of time, place and circumstances, and that the better practice is to admit whatever matters are relevant and leave the question of their weight to the jury, unless the court can clearly see that they are too remote to be material. *Id.* at 311–12, 36 S.E.2d at 416.

It is well understood that '[a]s a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.' *State v. Gwinn,* 169 W.Va. at 457, 288 S.E.2d at 535. 'The admissibility of evidence concerning prior bad acts under rule 404(b) must be determined upon the facts of each case; no exact limitation of time can be fixed as to when prior acts are too remote to be admissible.' *McIntosh,* 207 W.Va. at 572, 534 S.E.2d at *768, quoting State v. Burdette,* 259 Neb. 679, 697, 611 N.W.2d 615 (2000). **Furthermore, '[w]hile remoteness in time may weaken the probative value of evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.'"** *State v. Rash*, 226 W. Va. 35, 45-46, 697 S.E.2d 71, 81-82 (2010).

- Failure to request limiting instructions may negatively affect your client's fate at trial and will negatively affect your client's chances of winning on appeal.

Trial attorneys often refuse limiting instructions because they do not want to draw more attention to 404(b) evidence. However, this seems to be based upon the presumption that juries will forget the 404(b) evidence if no instructions are read, and they will not follow instructions if given. At any rate, this is a tactical decision that should be informed. If your gamble fails and your client is still convicted, a lack of limiting instructions will hurt your client's chances on appeal. Justice Cleckley wrote: "A defendant who objects to the giving of a limiting instruction

at trial may not later complain that the instruction was not given or that the failure to give the instruction increased the likelihood of the jury misusing the Rule 404(b) evidence." *State v. McGinnis*, 193 W. Va. 147, 157, n.12, 455 S.E.2d 516, 526, n.12 (1994), *citing State v. Dorisio*, 189 W.Va. 788, 434 S.E.2d 707 (1993). "On other occasions, we have stated that the trial court is under no obligation to give a limiting instruction unless one is requested. Although a trial court is not obligated to give a limiting instruction unless requested, we strongly recommend that the instruction be given unless it is objected to by the defendant. We deem the giving of a limiting instruction and its effectiveness significant not only in deciding whether to admit evidence under Rule 404(b), but **the absence of an effective limiting instruction will be considered by us on appeal in weighing the prejudice ensuing from the erroneous admission of Rule 404(b) evidence.**" *State v. McGinnis*, 193 W. Va. 147, 156-57, 455 S.E.2d 516, 525-26 (1994) (internal citations omitted).

Limiting instructions must be specific: The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction. Syllabus Point 1, in part, *State v. McGinnis*, 193 W. Va. 147, 151, 455 S.E.2d 516, 520 (1994).

Defendants have a right to limiting instructions for 404(b) evidence: "[I]t is customary to give the jury a limiting instruction with regard to its consideration of a collateral crime. This instruction generally provides that the evidence of a collateral crime is not to be considered as proof of the defendant's guilt on the present charge, but may be considered in deciding whether a given issue or element relevant to the present charge has been proven. **When a defendant requests this limiting instruction, it must be given.**" *State v. McGinnis*, 193 W.Va. 147, 156,

455 S.E.2d 516, 525 (1994), *quoting State v. Dolin*, 176 W. Va. 688, 696, 347 S.E.2d 208, 216 (1986).

- Intrinsic evidence is not 404(b) evidence, so a *McGinnis* test is not required.

"Other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged. One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case. Intrinsic evidence is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the *res gestae*. **Intrinsic evidence is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other and is thus part of the *res gestae* of the crime charged.** Where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*. The jury is entitled to know the setting of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *State v. Harris*, 230 W. Va. 717, 721-22, 742 S.E.2d 133, 137-38 (2013) (internal citations omitted).

- 404(b) evidence is more prejudicial in circumstantial evidence cases.

"When the circumstantial nature of the evidence requires the jury to construct a chain of logical inferences in order to find guilt, strict adherence to the rules of evidence becomes crucially important." *State v. McGinnis*, 193 W.Va. 147, 163-64, 455 S.E.2d 516, 532-33

(1994), *quoting State v. Walker*, 188 W.Va. 661, 668, 425 S.E.2d 616, 623 (1992). "The indiscriminate receipt of [collateral act] evidence in volume and scope can predispose the minds of the jurors to believe the accused guilty of the specific crime by showing him guilty or charged with other crimes.... **The excessive zeal of the prosecutor in introducing evidence of collateral crimes can and has affected the accused's right to a fair trial.**" *McGinnis* at 164, 533, *quoting State v. Thomas*, 157 W.Va. 640, 656-57, 203 S.E.2d 445, 456 (1974).

- Evidence of a defendant's sexual proclivities – admissibility depends upon the age of the alleged victim.

Generally: "It is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant's improper or lustful disposition toward his victim." *State v. Parsons*, 214 W. Va. 342, 350, 589 S.E.2d 226, 234 (2003), *citing* Syllabus Point 7, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

Child victims: *Dolin* was overruled in part by *Edward Charles L.* *Edward Charles L.* allows collateral acts or crimes to be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident(s) giving rise to the indictment. *State v. Edward Charles L.*, 183 W. Va. 641, 651, 398 S.E.2d 123, 133 (1990).

However, *Dolin* still applies to adult victims: "It is well-established that '[i]t is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant's improper or lustful disposition toward his victim.' Syllabus Point 7, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). While this holding was modified by this Court in *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990), to allow such evidence where the

victim is a child, **the decision was not modified with respect to adult victims."** *State v. Angle*, 233 W. Va. 555, 562, 759 S.E.2d 786, 793 (2014).

The Court has shown sensitivity to the prejudicial nature of a defendant's sexual proclivities. A victim's testimony that she had heard how defendant was and that defendant just wanted one thing from girls was inadmissible evidence of defendant's character as a sexual predator, thus constituting reversible error. *State v. Maggard*, 232 W. Va. 55, 750 S.E.2d 271 (2013). It is notable that Justice Loughry wrote a heated dissent in which he accused the majority of "the worst kind of result-oriented jurisprudence."

- Dismissed criminal charges may be properly admitted under 404(b).

A criminal charge against a defendant is dismissed or that he/she is acquitted of the same does not prohibit use of the incident under Rule 404(b) of the West Virginia Rules of Evidence. Syllabus Point 4, *State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007).

- Cases involving evidence of *modus operandi* are not very common – think Jack the Ripper.

"Modus operandi is a 'theory that where a defendant commits a series of crimes which bear a unique pattern such that the *modus operandi* is so unusual it becomes like a signature.' *State v. Dolin*, 176 W.Va. at 698, n. 14, 347 S.E.2d at 218, n. 14. *Modus operandi* may be admissible as Rule 404(b) evidence. Other-crime evidence may be admitted if the evidence of other crimes is so distinctive that it can be seen as a "signature" identifying a unique defendant, such as the infamous Jack the Ripper.... **[E]vidence of the commission of the same type of crime is not sufficient on this theory unless the particular method of committing the offense, the *modus operandi* (or m.o.), is sufficiently distinctive to constitute a signature. Other-crimes evidence is not permissible to identify a defendant as the perpetrator of the charge act simply because he or she has at other times committed the same garden variety criminal**

act. When Rule 404(b) evidence is offered to establish *modus operandi*, the proffering party must make a showing of substantial similarity and uniqueness to establish the proffered evidence's probative value." *State v. McDaniel*, 211 W. Va. 9, 13, 560 S.E.2d 484, 488 (2001).

- 404(b) evidence of a defendant's drug use in a B&E and larceny prosecution is improper and constitutes reversible error.

"We concur with the recognition of the California Supreme Court that the impact of narcotics addiction evidence upon a jury of laymen is catastrophic .... It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent. We are not alone in agreeing with this view for the New Jersey Appellate Division has said that 'the prejudicial nature of the evidence of drug use is particularly self-evident and overwhelming. It is difficult to conceive of anything more prejudicial to a defendant than presenting him to the jury as a drug addict. **Thus, in cases where the object of the offense was to obtain money for drugs, as the prosecution alleges in this case, evidence of the accused's drug use has been found to be inadmissible.**' Here, though, the State's 404(b) evidence showed that Mr. Taylor himself was not only a regular user of marijuana but also of such hard drugs as regular and crystal methamphetamine and that he himself stole things in order to support his habit. … We also find that the prejudice here was enhanced because the State's evidence related to acts that were four months old at the time of the break-ins. Furthermore, while we recognize the circuit court gave limiting instructions in this case (both at the time the evidence was offered at trial and then again when the court was instructing the jury before deliberations), given the catastrophic impact of Mr. Taylor's drug use, we have to conclude that this case presents an instance where limiting instructions simply could not have reduced the unfair prejudice to Mr. Taylor to a point where he could receive a trial based upon what was really at issue in this case—whether he broke

and entered and committed larceny and not whether he should be convicted because of his habitual drug use." *State v. Taylor*, 215 W. Va. 74, 79, 593 S.E.2d 645, 650 (2004) (internal citations omitted).

- On appeal: The dreaded 404(b) harmless error analysis

The court's harmless error analysis is always a roadblock on appeal. It is a convenient way for the court to recognize trial errors and yet still affirm convictions. Justice Ketchum has argued against the use of the harmless error doctrine in relation to 404(b) evidence, but unfortunately I doubt that he will convince two more justices of this in the near future. *State v. Willett*, 223 W.Va. 394, 400-06, 674 S.E.2d 602, 608-14 (2009) (Ketchum, J., concurring). If you are writing an appeal, you should include a section in your initial brief that addresses the State's inevitable reponse that if there is an error, it is harmless.

Two ways to find harmful, reversible error for improper admission of 404(b) evidence: "Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury." Syllabus Point 2, *State v. Atkins*, 163 W. Va. 502, 502, 261 S.E.2d 55, 56-57 (1979).

Prejudice analysis: "In any inquiry into the prejudicial impact of the error, we will be guided by whether the record reveals that the error was repeated or singled out for special emphasis in the State's argument. We will scrutinize the record to determine if the error became the subject of

a special instruction to the jury, or produced question from the jury. Also of importance is the overall quality of the State's proof. While the principles of appellate review under *Starkey* entitled the State to have its case viewed in the most favorable light, this is because the jury's verdict of guilty is taken to have resolved factual conflicts in favor of the State in recognition of the jury's role in evaluating the credibility of the witnesses. If the case contains a number of substantial key factual conflicts or is basically a circumstantial evidence case, or is one that is largely dependent on the testimony of a co-participant for conviction, there is an increased probability that the error will be deemed prejudicial. Further, if the error is related to critical testimony of the defendant, the more likely that it will be deemed prejudicial. A further consideration is the cumulative effect of the error in the context of the entire trial. We have recognized that there may be error which, standing alone, is not sufficient to require a reversal, but that when cumulated with other marginal error, the combined effect may be sufficient to warrant a reversal." *State v. Atkins*, 163 W. Va. 502, 514-15, 261 S.E.2d 55, 62-63 (1979).

[Optional reading]: Recently, the Court articulated a different, oversimplified 404(b) harmless error analysis that merely asks whether the error affected "the outcome of the proceedings in the circuit court." *State v. Bowling*, 232 W.Va. 529, 542, 753 S.E.2d 27, 40 (2013) (per curiam), *citing* Syllabus Point 9, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). This means that a 404(b) error will only result in a new trial if, but for the error, the defendant would have been found not guilty.

The problem with the 404(b) harmless error rule applied in *Bowling* is that it is derived from *State v. Miller*, which is a plain error case, not a 404(b) case. Syllabus Point 9, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). There is a vast difference between plain error and 404(b) error. Plain error occurs when a litigant waives an objection at trial, thereby denying the

trial court an opportunity to correct the alleged error. The plain error doctrine is used sparingly and it authorizes an appellate court to correct only particularly egregious errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. *State v. Miller,* 194 W.Va. 3, 18, 459 S.E.2d 114, 129 (1995). The plain error standard sets a high bar that reflects the Court's distaste for litigants that sit on their rights at trial. In contrast, objections to 404(b) evidence are always preserved in a *McGinnis* hearing, and 404(b) error is likely to be highly prejudicial and result in a new trial. In addition to all of this, *Bowling* is a *per curiam* opinion that in no way overrules the long standing *Atkins* harmless error rule. In sum, plain error and 404(b) error have almost nothing in common, and the *Bowling* test should be consigned to the dustbin of history.

- Appellate Standard of Review

If you are writing an appeal, it is always a good idea to include the standard of review in your brief. This will help you argue to the standard and it should head off this "gotcha" question from the court if you get to oral argument.

"The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403." *State v. LaRock*, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

"Our function on … appeal is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion. In

reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect." *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994).

- Policy statements regarding 404(b) evidence made by individual justices in dissenting and/or concurring opinions.

404(b) evidence is very prejudicial: "I fear that Rule 404(b) has become a runaway train in criminal cases. The niceties of a *McGinnis* analysis do little to remove the overwhelming prejudicial effect that is heaped upon a defendant in a criminal case, once a jury learns of the defendant's previous bad acts. Despite the limited reasons for which the evidence is purportedly offered, and despite cautionary instructions given to the jury—both when the evidence is adduced and in the court's general charge—the result is the same: all doubts are resolved against the defendant, because he is a proven bad actor. I would hope that we could limit the trial of criminal cases—where there is the prospect of losing one's freedom—to the facts that are known about the incident on trial, rather than regularly relying on other incidents of bad conduct to bolster and help insure successful prosecutions. Tossing aside the safeguards of our Constitution to promote and insure convictions is a much greater threat to democracy than risking an occasional offender not being convicted. In this case, the defendant would just as likely have been convicted of the charged offense without all of the Rule 404(b) evidence enumerated in Footnote 9 of the majority opinion. Trial by innuendo and inference is not the American way." *State v. Scott*, 206 W. Va. 158, 168, 522 S.E.2d 626, 636 (1999) (Starcher, J., dissenting).

"We all know the axiom that [i]n the trial of a criminal offense, the presumption of innocence existing in favor of a defendant continues through every stage of the trial until a finding of guilty by the jury. But the real world truth is that, when a jury hears evidence that a defendant has

committed some bad acts beyond those in the indictment, the jury dispenses with any notions that the defendant is innocent and reviews the evidence from the perspective that the defendant is a 'bad person.' It is undeniable that a jury will be more inclined to convict once they hear that a defendant may have engaged in other 'bad acts'—even if the defendant was never charged or convicted for that other conduct. *State v. Willett*, 223 W.Va. 394, 400-01, 674 S.E.2d 602, 608-09 (2009) (internal citations omitted) (Ketchum, J., concurring).

404(b) hearings should not be held in public: "[T]he trial court held a pre-trial hearing to consider Rule 404(b) bad character evidence in open court, with the press present. I believe in freedom of the press and in open courts, but this type of evidence is supposed to be reviewed *in camera. Black's Law Dictionary* defines an *in camera* hearing as one 'in the judge's private chambers.' When the prosecutor uses the press to spill details of an accused's prior bad acts into the public forum, it tends to prejudice the accused's ability to get a fair trial on the present accusation." *State v. Bowling*, 232 W. Va. 529, 552, 753 S.E.2d 27, 50 (2013) (Ketchum, J., dissenting), *cert. denied*, 134 S. Ct. 1772, 188 L. Ed. 2d 603 (2014).

- Other reversals not mentioned

State v. Baker, 230 W.Va. 407, 738 S.E.2d 909 (2013); *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011); *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001); *State v. Walker*, 188 W.Va. 661, 668-69, 425 S.E.2d 616, 623-24 (1992); *State v. Moore*, 166 W.Va. 97, 273 S.E.2d 821 (1980).